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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK,
Petitioner,
v.
THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

COUNTY OF ALLEGANY,
Petitioner,
v.
THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

COUNTY OF CORTLAND,
Petitioner,
v.
THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF ROCKY MOUNTAIN LOW-LEVEL RADIOACTIVE WASTE COMPACT, NORTHWEST INTERSTATE COMPACT ON LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT, AND SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMPACT IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the various provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which ratify and implement the unanimous agreement of the several States regionally to resolve longstanding interstate disputes with respect to low-level radioactive waste disposal policies, are consistent with fundamental principles of federalism.

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INTEREST OF *AMICI CURIAE*

The Rocky Mountain Low-Level Radioactive Waste Compact, the Northwest Interstate Compact on Low-Level Radioactive Waste Management, and the Southeast Interstate Low-Level Radioactive Waste Management Compact (collectively, the "Compacts") are three of the nine interstate compacts organized by the States and authorized by Congress to supervise State and regional low-level radioactive waste ("LLRW") disposal.[1] For political and economic reasons discussed in detail herein, LLRW disposal has been the subject of a number of serious interstate disputes. The Compacts are the embodiments of the regional solution of those disputes crafted by the States themselves in 1980 and 1985 compromises, the latter of which was ratified by Congress in the challenged legislation. The Compacts believe that their regional perspective will assist the Court in addressing the role of federalism in this unique context where Congress has acted only as an arbiter of disputes among the States.

STATEMENT

Although this case presents a question of fundamental importance, it is not the one suggested by New York. Specifically, this case does not require a choice between *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), or any other federalism test. Rather, this case requires this Court for the first time to address the operation of the Constitution's structural federalism protections where Congress acts in the role of an *umpire* arbitrating interstate trade disputes, rather than as a lawmaker imposing uniform national policies on the States. As is demonstrated herein, when Congress acts in this umpire role, the concerns that led to our federalist

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[1] The Rocky Mountain compact includes Nevada, Wyoming, Colorado, and New Mexico. The Northwest compact includes Washington, Oregon, Idaho, Montana, Utah, Alaska, and Hawaii. The Southeast compact includes South Carolina, North Carolina, Virginia, Tennessee, Mississippi, Alabama, Georgia, and Florida.

system—principally, preventing one sovereign from aggrandizing its power at the expense of the other and preserving political accountability—are least implicated.

A. The Politics and Economics of LLRW Disposal Facility Siting.

"Waste has nothing to recommend it."[2] Its introduction into a community carries with it both aesthetic and economic problems for local residents. And, when waste bears the label "radioactive" those problems are greatly magnified: "[Radiation] is not only invisible, impalpable, and inaudible, like the miasmas against which our less sophisticated predecessors closed their shutters, but odorless as well. [I]t has come to symbolize all that is insidiously threatening."[3] Thus, while safe, long-term disposal technology does presently exist,[4] siting a LLRW disposal facility is inevitably a political bombshell.

Moreover, the operation of the "Dormant" Commerce Clause, which has been interpreted to restrict a State's ability to close its borders to waste originating in its sister States, see *e.g.*, *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), significantly affects the political and economic calculus by empowering a State to "export" its LLRW to other States. Thus, although

> [t]he costs of a new facility, including the financial and political costs of dealing with local opposition, fall primarily on the host state . . . the benefits of the facility accrue in part to the several surrounding states. Conversely, the costs of a state's failure to ensure that new facilities are built fall primarily on surrounding states whose facilities receive the excess

[2] Bord, *The Low-Level Radioactive Waste Crisis: Is More Citizen Participation the Answer?*, *in* Low-Level Radioactive Waste Regulation 193, 195 (Burns ed., 1988).

[3] Lutzger, *Making the World Safe for Chicken Little, or the Risks of Risk Aversion*, *in* Low-Level Radioactive Waste Regulation 175, 179 (Burns ed., 1988).

[4] National Governors' Ass'n, *Low-Level Waste: A Program For Action* 1 (Oct. 1980) ("NGA 1980 Report").

> waste, whereas the benefits of such a decision accrue to the state which, in effect, decides to export its hazardous wastes. Thus, states that have too few hazardous waste facilities lack incentives to participate in the siting process and thereby to ensure that new facilities are built within their borders.

Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 Harv. Envtl. L. Rev. 307, 327 (1982).[5] Together this "reverse commons" problem and exaggerated perceptions of risk create the familiar "not-in-my-backyard" syndrome: "each community [or State] refuses to take action in the hope that if it delays long enough, facilities will be sited in other communities [or States]." *Id.* at 325; see also 131 Cong. Rec. H11,416 (daily ed. Dec. 9, 1985) (statement of Rep. Nielson) ("We have often said in this Congress that a radioactive waste site is a great thing for your neighbor's State to have").

These same political and economic considerations pose a significant barrier to a market solution. Private site developers must locate persons in each community who are willing to negotiate—a difficult task given the politics of LLRW; they must also shop around for a community willing to accept "reasonable" compensation. Moreover, since many people view LLRW disposal sites as inherently unsafe, it may be that no amount of money is sufficient to win local support. Finally, even if local support can be garnered, activists may be able to orchestrate a state veto. See McCaughey, *South Dakota Town Dreams of its Own Nuclear Waste Dump*, The Energy Daily 13 (17):1, 4 (1985).

[5] *See also* McConnell, *Federalism: Evaluating the Founders' Designs*, 54 U. Chi. L. Rev. 1484, 1495 (1987) ("if the costs of government action are borne by the citizens of State C, but the benefits are shared by the citizens of States D, E, and F, State C will be unwilling to expend the level of resources commensurate with the full social benefit of the action"); Posner, *Economic Analysis of Law* 600 (3d ed. 1986) ("If either the benefits or costs of an activity within a state accrue to nonresidents . . . the incentives of the state government will be distorted").

Even if risk perceptions and the reverse commons problem can be resolved with a potential host community, the economics of operating a LLRW disposal facility complicate the siting equation. With the exception of a few of the biggest waste-generating states—such as New York—the volume of waste generated in a single state is too small to make a single-state disposal site economical. NGA 1980 Report at 6. Instead there is a need for a limited number of well-regulated and economically viable regional sites.[6]

B. The Events Leading to the Low-Level Radioactive Waste Policy Act of 1980.

By the mid 1970's an interstate LLRW disposal crisis started to brew. Between 1975 and 1979, the nation saw its inventory of LLRW disposal sites fall by half when New York and Illinois—two of the largest generating states—and Kentucky closed their facilities. Officials in the three remaining States with disposal facilities—South Carolina, Nevada, and Washington—along with the Southern and Western regions of the nation generally, became understandably concerned that they were becoming the nation's nuclear dumping grounds. Moreover, there was no movement in any other States to develop alternative disposal sites to relieve this interstate tension. In 1979, the States with disposal facilities took action. The governors of Nevada and Washington temporarily closed their States' LLRW disposal facilities,[7] and the governor of South Carolina indicated that State's intent to reduce dramatically the amount of low-level waste it would accept.[8] And, in 1980, the voters of Washington overwhelmingly approved Initiative 383 prohibiting importation of non-medical radioactive waste after July 1, 1981.[9]

[6] "Regionalization" is also mandated by safety concerns connected with long distance transportation of LLRW. See section 4(a)(1)(B) of the Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980) ("low-level radioactive waste can be most safely and efficiently managed on a regional basis").

[7] The Nevada and South Carolina sites are scheduled to close permanently by the end of 1992. Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 50, 52 (1991).

These developments sharply focused congressional attention on LLRW disposal, and a number of proposals—including federal preemption of State siting decisions—were considered. Congressional action was deferred, however, at the request of the States, who urged Congress to allow them to develop a cooperative State and regional LLRW policy. The National Governors' Association ("NGA"), the National Conference of State Legislatures, and the State Planning Council on Radioactive Waste Management all examined the LLRW disposal problem, and by the summer of 1980 a State solution—supported by New York and every other state—was crafted. The States proposed solving the LLRW disposal problem on a regional basis, whereby groups of States would enter interstate compacts, to be approved by Congress, to provide a single disposal facility for all waste generated within the region.

Congress enacted the State compromise in the Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1980). States were invited to enter compacts "to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste." § 4(a)(2)(A). Beginning January 2, 1986, each congressionally-ratified compact was authorized to "restrict the use of the regional disposal facilities under the compact to the dis-

[8] *See* Peckinpaugh, *The Politics of Low-Level Radioactive Waste Disposal, in* Low-Level Radioactive Waste Regulation 45, 46 (Burns ed., 1988).

[9] *See id.* Initiative 383 was subsequently declared unconstitutional. *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 518 F. Supp. 928 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

posal of low-level radioactive waste generated within the region." *Id.* at § 4(a)(2)(B). The logic of the proposal was that this authority to exclude out-of-region waste would spur nonsited States either voluntarily to negotiate a disposal contract with a neighboring sited State or compact or to develop a new disposal site, either alone or with other States through a regional compact.

The 1980 Act had an immediate and positive effect on the LLRW disposal problem. By 1982, 13 states had siting programs in effect, see National Governors' Ass'n, *State Siting Programs in Effect as of January 1, 1982* (Jan. 25, 1982), and 37 states had entered into compacts by the summer of 1985, see Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1952?*, 11 Harv. Envtl. L. Rev. 437, 447 (1987). However, while many States and regions made significant progress toward LLRW disposal self-sufficiency, both the States and Congress had seriously underestimated the force of local siting opposition.

C. The Low-Level Radioactive Waste Policy Amendments Act of 1985.

By 1983 it became clear that the States and regions would require more time to work out their siting arrangements, see Berkovitz, *Waste Wars*, 11 Harv. Envtl. L. Rev. at 445, and interstate tension reached a new high as the 1986 target date approached.[10] Again, congressional action appeared imminent, and again the States, expressing their continuing view that LLRW disposal was best addressed at the State and regional level, *not* the national level, requested the opportunity to craft a State and regional solution. Congress assented, and the States reconvened, once more under the auspices of the NGA. They emerged with a hard-fought compromise pursuant to which sited States and regions would open their facilities to out-of-state waste for an additional seven years in return for a commitment by the other States—backed by strong incentives—to attain self-sufficiency, either individually or by contract or compact by 1993.[11] With the unanimous passage of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021i (the "1985 Amendments"), which was "primarily a resolution of the conflicts between the States that do not have disposal capacity, and the three other States that have capacity," 131 Cong. Rec. H11,410 (daily ed. Dec. 9, 1985) (statement of Rep. Udall), Congress adopted the States' compromise.

In accordance with this compromise, the 1985 Amendments contained a series of milestones or interim goals for States without existing disposal facilities. First, each State was expected by July 1, 1986, to join a compact or indicate an intent to "go-it-alone." See 42 U.S.C. § 2021e(e)(1)(A).[12] Next, by January 1, 1988, each compact or go-it-alone state was encouraged to identify a facility location and develop a facility siting plan, or contract with a sited compact for access to that region's

[10] *See Ratification of Interstate Compacts for Low-Level Radioactive Waste: Hearings before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs on H.R. 1012, H.R. 3092, H.R. 3777*, 98th Cong., 1st Sess. 64 (1983) (statement of Holmes Brown, National Governor's Association) ("The States . . . are concerned that regions are going to play chicken in Congress with the regions without disposal capacity threatening to block ratification of compacts [with disposal capacity]. On the other hand, those regions [with capacity] may say if we don't get satisfaction—in other words, if our compacts are not ratified—we are under no requirement to keep our sites open").

[11] *See* Peckinpaugh at 55 ("The sited states were not about to be burned again by other nonsited states that failed, for whatever reason, to develop new disposal sites").

[12] Even States which made an initial decision to "go-it-alone" remain free to join an existing compact or form a new compact with other unaffiliated States. Indeed, at least four unaffiliated States are actively seeking to enter contracts or compacts with States or compacts that will have disposal facilities by January 1, 1993. Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 40 (1991).

facility. *Id. at* § 2021e(e)(1)(B). The January 1, 1990 milestone called for an application for a disposal license, or the filing of a contract with a sited region for access to that region's facility or the filing of a certification expressing an ability to attain LLRW disposal self-sufficiency by December 31, 1992. *Id.* at § 2021e(e)(1)(C). January 1, 1992 was the milestone date for final license applications or intercompact disposal agreements. *Id.* at § 2021e(e)(1)(D).

The 1985 Amendments provided three basic incentives to State attainment of the milestone goals and the States' promises to resolve their LLRW disposal problems:

> (1) *The Access Provisions*: Beginning July 1, 1986, sited regions and States may charge noncomplying States' generators surcharges two to four times higher than surcharges paid by complying States' generators, and beginning January 1, 1987, sited regions and States may deny all access to the waste of noncomplying States' generators, 42 U.S.C. § 2021e(e)(2);
>
> (2) *The Expenditures Provisions*: Beginning July 1, 1986 complying States are eligible for payments—funded by the disposal surcharges—to defray costs of the siting process, *id* at § 2021e(d)(2)(B);
>
> (3) *The Take Title Provision*: Beginning January 1, 1996, noncomplying States at "the request of [a] generator or owner of . . . waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred . . . as a consequence of the failure of the State to take possession of the waste." *Id.* at § 2021e(d)(2)(C).[13]

[13] The so-called "Take Title" provision does *not*, in fact, require New York or any other State to take title to LLRW. New York can either solve its LLRW disposal problem alone or collectively with another State or group of States *or* take title *or*, if it chooses to abdicate all responsibility for LLRW disposal, risk liability to New York generators injured by its failure to address New York LLRW disposal issues.

The 1985 Amendments have been extremely successful at solving the seemingly intractable hurdles to LLRW disposal facility siting. There are now a total of nine interstate compacts, representing 43 states. See Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 3 (1991). Each of the compacts has designated a State to host a disposal facility. *Id.* Three of the host states—California, Nebraska, and Illinois—have submitted license applications, and the California facility is nearly operational. *Id.* at 7, 12, 26. In addition, the Northwest Compact and the Rocky Mountain Compact have negotiated a proposed agreement whereby generators in the Rocky Mountain Compact's member states will have long-term access to the LLRW disposal site in Washington. *Id.* at 47. Finally, the few states—including New York—that have elected to go-it-alone have also made significant progress.[14] While hurdles remain to complete State self-sufficiency, the cooperative *State* compromise represented by the 1985 Amendments continues to provide an adequate framework to bring the LLRW disposal crisis to ultimate resolution.

SUMMARY OF ARGUMENT

This case requires the Court to address for the first time the nature of judicial review under fundamental principles of federalism when Congress assumes the role of arbiter of disputes among the several States. Neither of the principal purposes of federalism—preventing one sovereign from aggrandizing its power at the expense of the other and preserving political accountability—is implicated by the 1985 Amendments. At bottom, the 1985 Amendments embody a *State* agreement to resolve interstate and interregional disputes. Congress neither usurped

[14] Through 1990, New York, for example, met each of the milestone goals and was judged in full compliance with the 1985 Amendments by the Department of Energy and the sited States. Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 65 (1991).

State decisionmaking authority nor co-opted the States as enforcers of national policy when it granted its constitutionally required approval to that agreement. Rather, Congress merely enacted incentives—most of which were themselves suggested by the States—to encourage the States to stick to their own bargain.

It is these incentives, *not*, as New York argues, the phraseology Congress employed in setting forth the terms and conditions of the State bargain, that are subject to the review of this Court. These incentives pass constitutional muster under any federalism test urged upon this Court. Indeed, the first two incentives—the Access and Expenditure Provisions—are so plainly constitutional that New York's only attempt to invalidate them is its misguided assertion that they are not severable from the more controversial Take Title Provision.

The Take Title Provision is itself constitutional. The federal government has broad constitutional authority to resolve interstate disputes—including the authority, in this context, to issue commands to the States. Stripped of rhetoric, the only potential burden imposed upon New York by the Take Title Provision is a financial one permissible even under *National League of Cities*, because States retain control over the basic policy choices. In any event, there is a compelling federal interest in enforcing the regional solution agreed upon by the States.

Finally, the Take Title Provision plainly *is* severable. Congress would have elected to retain the Access and Expenditure incentives for State compliance with the State bargain even if the further incentive provided by the Take Title Provision was unavailable.

ARGUMENT

I. The 1985 Amendments Promote And Do Not Impede Fundamental Principles Of Federalism.

The Compacts, whose members are States, wholeheartedly agree with New York that federalism is a "fundamental principle." *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2399 (1991). But New York's distaste for the 1985 Amendments does not rest on federalism concerns. Rather, New York turns federalism on its head when it raises that doctrine as a *barrier* to State resolution of the State and regional problem of LLRW disposal facility siting.

At bottom, this is simply an interstate and interregional dispute. New York would like to foist its LLRW disposal problems on its more responsible neighbors. Its neighbors insist that it abide by the basic agreement embodied in the 1985 Amendments, which, like the 1980 Act, were fundamentally a *State* resolution of the dispute. New York was an active and vocal participant in the negotiation process, and for seven years after enactment, New York played along, doing just enough to retain access to the LLRW disposal facilities of the sited States and compacts. Having fully availed itself of all of the benefits of the 1985 Amendments' state-negotiated seven-year extension in access, New York petitions this Court for relief from the performance of its end of the bargain—namely, LLRW disposal self-sufficiency, which it is free to accomplish either by allowing construction of a LLRW disposal facility in New York or by entering a compact or a voluntary disposal contract with a sister State or States.

It is not surprising, then, that New York has failed to demonstrate that the 1985 Amendments in any way threaten state sovereignty or violate established principles of federalism. Under any rational analysis of the values inherent in our Federalism, the 1985 Amendments are not only unobjectionable, they are a laudable example of congressional respect for the position of the States in our federal system.

New York simply puts the constitutional cart before the horse: in its single-minded bid to construe individual decisions of this Court against the 1985 Amendments, it loses sight of the driving force of federalism that animates those decisions. Thus, while it repeatedly refers to the Tenth Amendment and the Guarantee Clause, it offers little insight into the fundamental values that lay behind the doctrine of federalism embodied in those provisions. Most specifically, New York fails to identify how the extraordinary step of judicial invalidation of the State-sponsored 1985 Amendments by the federal courts would promote *any* federalism values.

As this Court has recently reaffirmed, the triumvirate of federalism—Article IV, the Tenth, and the Eleventh Amendments—articulates a *structural* protection of sepation of governmental powers, see, *e.g.*, *Ashcroft*, 111 S. Ct. at 2399-2401, just as the structure of Articles I, II and III of the Constitution informs the doctrine of separation of powers between the departments of the national government, see, *e.g.*, *Immigration & Naturalization Serv.* v. *Chadha*, 462 U.S. 919, 946 (1983). Thus, any principled application of federalism to a challenged federal statute must begin by indentifying what fundamental values the doctrine is designed to promote. Constitutional history and this Court's decisions make clear that the principal goal of the doctrine of federalism is the same as the principal goal of the doctrine of separation of powers: protection of individual liberty through the preservation of multiple, robust, politically accountable competitors for government power. See, *e.g.*, The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people"); *Ashcroft*, 111 S. Ct. at 2400 ("In the tension between federal and state power lies the promise of liberty").

Properly viewed, this Court's federalism cases convey the consistent message that adherence to constitutional principles of federalism is determined through a twofold inquiry. First, the *aggrandizement* test asks whether the challenged provision is within the scope of Congress' enumerated powers or constitutes usurpation of State decisionmaking authority. See, *e.g.*, *Ashcroft*, 111 S. Ct. at 2400 ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front"); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("it was a favorite object in the Convention to provide for the security of the States against federal encroachment. . ."') (internal quotations omitted). Second, the *political accountability* test asks whether Congress in an attempt to avoid political and economic costs of federal legislation has impermissibly imposed a duty on the States to enforce *national* policies. See, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 777 (1982) (O'Connor, J., dissenting in part) ("State legislative and administrative bodies are not field offices of the national bureaucracy").

The 1985 Amendments infringe neither of these "affirmative limits the constitutional structure . . . impose[s] on federal action affecting the States under the Commerce Clause." *Garcia*, 469 U.S. at 556. First, there is *no* aggrandizement of federal power. On the contrary, the 1985 Amendments "unquestionably manifest[] an intention to leave this subject entirely to the States." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 207 (1824). Indeed, both the 1980 Act and the 1985 Amendments *increased* the authority of those states willing to join a compact and take responsibility for LLRW disposal problems on a regional basis by allowing them to limit access to the waste of their neighbors who refuse to accept that responsibility. There simply can be no doubt that through the 1985 Amendments Congress—at the States' request—has properly respected the States' authority to deal with their local and regional problems.

Nor is there any political accountability problem. The federal government has imposed *no* federal LLRW disposal policies on the States. Rather, the 1985 Amendments affirmatively express Congress' view that the LLRW problem should be worked out *entirely* by the States, individually and as members of interstate compacts. Congress neither set minimum federal standards, see, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), nor required consideration of federal proposals, see, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742 (1982).

Under the 1985 Amendments the States retain both authority over and political accountability for their LLRW disposal policies. *States* choose whether to handle LLRW disposal internally or to contract with other States or compacts in a joint disposal effort. 42 U.S.C. 2021c(a)(1). *States* choose whether to make LLRW disposal a government function or to leave siting, construction and management of disposal facilities to private firms (at private expense). *States* choose whether licensing and regulation of whatever disposal facilities they allow to be built will be handled by the federal government or by the States themselves, pursuant to authority conferred by the "agreement states" program under the Atomic Energy Act. *See* 42 U.S.C. § 2021. Finally, *States* choose how disposal efforts will be funded—they retain complete freedom to place the entire burden on waste generators by charging disposal fees or taxes directly or by allowing sister state facility operators with whom they have contracted to collect such fees. Indeed, pursuant to the 1985 Amendments, *States* can even abdicate *all* responsibility for LLRW disposal—fiscal and administrative—simply by allowing private firms to place their own capital at risk in privately owned and operated disposal facilities, regulated by the federal government.

The 1985 Amendments also further the secondary goals of federalism. Local, decentralized control of LLRW disposal facilitates government decisions sensitive to the diverse interests affected, increases the opportunity for citizen involvement in the democratic process, and promotes innovation and experimentation. See *Ashcroft*, 111 S. Ct. at 2399. New York's federalist call to arms simply rings hollow; true federalists should welcome Congress' decision not to follow its modern tradition of pushing the States aside and imposing uniform national solutions to State and regional problems.

Examination of the impact on federalism values that would accompany judicial invalidation of the 1985 Amendments is also informative. Such action would almost surely *increase* federal intrusion on state sovereignty. Initially, sited states, rightly frustrated by the inequity of bearing involuntarily other states' burdens and angered by New York's eleventh-hour breach of the 1985 bargain, would likely renew their efforts unilaterally to close their borders to out-of-state waste. New York and other generating states would undoubtedly respond with suits in *federal* court. But, experience has demonstrated that the exercise of judicial power pursuant to authority found under the "Dormant" Commerce Clause, is ill-equipped to reconcile the conflicting and shifting regional equities, science, and politics of waste disposal.[15] Disjointed and pervasive judicial intrusion into state legislative processes—including judicial review of legislative motivations, see *City of Philadelphia* v. *New Jersey*, 437

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[15] *See Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("[w]eighing the governmental interests of a State against the needs of interstate commerce is . . . a task squarely within the responsibility of Congress . . . and ill suited to the judicial function"). *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 631 (1978) (Rehnquist, J., joined by Burger, C.J., dissenting) (inflexible application of "Dormant" Commerce Clause jurisprudence to problem of hazardous waste presents sited states with a "Hobson's choice"); *cf. West Virginia ex. rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) ("[interstate disputes are] more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted") (quotation omitted).

U.S. 617, 629 (1978)—would replace the orderly *State* resolution of LLRW disputes facilitated by the 1985 Amendments.

The only other alternative is complete federal preemption, with siting decisions made by a federal bureaucracy inherently more removed from the legitimate concerns of local citizens than are the States. Congress took the preemption route with high level radioactive waste ("HLRW"), and the results have hardly promoted federalism. The Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, § 1, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10,101-10,226), authorized the federal government to select a single site for disposal of all of the nation's HLRW, thus rendering States and their citizens virtually powerless to determine whether or not there will be a HLRW facility located "in their backyard." What has followed is a perfect example of the mischief that results when decisionmaking authority is insulated from political accountability—politics replaced equities and economics, and initial siting decisions arguably were made "primarily on the basis of political affiliation of congressional candidates from the affected states." Berkovitz, *Waste Wars*, 11 Harv. Envtl. L. Rev. at 486 n.197; see also *Politics Affected Nuclear Dump Choice*, Washington Post, Aug. 1, 1986, at A1, col. 6. Neither of these alternate approaches—federal judicial supervision or congressional preemption—serves the values of State sovereignty, political accountability, or individual liberty nearly as well as the approach crafted by the States and approved by Congress in the 1985 Amendments.

Here, Congress' *sole* role in these interstate disputes has been that of *umpire* or *referee*; Congress is not imposing *any* federal policies on the States. The States made a relatively simple bargain to resolve their interstate LLRW disputes: sited States agreed to open their borders to nonsited States' waste for another seven years, and in return the nonsited States agreed to attain self-sufficiency —individually or by compact. The States then asked Congress for its constitutionally-required approval of

their bargain. Congress assented, and it approved incentives to promote one simple and uncontroversial ground rule: *stick to your bargain*. The 1985 Amendments establish an orderly process for a collaborative resolution *by the States* of their State and regional problems. *Cf. West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a Sister State").

The role of umpire between disputing States and regions played by Congress in the 1985 Amendments is one central to the plan and structure of our Constitution. Perhaps the single most important reason for the historic change from Confederacy to federal Union was to provide a mechanism for resolving trade disputes between the States. See, *e.g.*, The Federalist No. 80, at 477-78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Whatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control"); *id.*, No. 7, at 62-63 (Hamilton); *id.*, No. 22, at 144 (Hamilton); *id.*, No. 42, at 267-68 (Madison). The Federalist papers and other writings contemporaneous with the framing of the Constitution clearly establish that Congress' "umpire" role was universally recognized as a legitimate function of the new national government and not an impermissible affront to state sovereignty.[16] Indeed, the Compact Clause

[16] The creation of "a superintending authority over the reciprocal trade of confederated States," was one of the driving forces behind the Constitution. The Federalist No. 42, at 268 (James Madison) Clinton Rossiter ed., 1961). *See also* Letter of James Madison to George Washington (April 16, 1787), *reprinted in* Ketchum, The Anti-Federalist Papers and the Constitutional Convention Debates 33 (1986) ("[t]he great desideratum which has not yet been found for Republican Governments seems to be some disinterested and dispassionate *umpire* in disputes between different passions and interests in the State") (emphasis added). Indeed, Madison later explained that the Commerce Power "was intended as a negative and preventive provision *against injustice among the States themselves*." Letter of James Madison to J.C. Cabell (Feb. 13, 1829), *reprinted in* 3 Farrand, The Records of the Federal Convention of 1787, 478 (1911) (emphasis added).

itself, U.S. Const. art. I, § 10, cl. 3, recognizes the fundamental role of Congress as arbiter of interstate disputes.

Unable to challenge the consistency of the general approach of the 1985 Amendments with fundamental federalism principles, New York has focused its attack on a single provision of the 1985 Amendments—the Take Title Provision—added by Congress to encourage nonsited states to hold to their bargain. While, as demonstrated, *infra*, that provision—and each of the other incentive provisions—is constitutionally permissible under any principled test of federalism, the nature of the federal role in the 1985 Amendments scheme is obviously the starting point in any federalism analysis. Where, as here, the underlying governmental dispute is State v. State or Region v. Region with the Congress acting only as a referee, rather than the Federal v. State struggles envisioned by the Framers when they crafted the structural protections of federalism, judicial review based on principles of federalism is properly at its lowest ebb. The 1985 Amendments are completely consistent with the Constitution's structural federalism protections, and New York's ostensibly federalist attack must therefore fail.

II. The 1985 Amendments Are Not Direct Federal Commands To The States.

New York erroneously characterizes the 1985 Amendments as federal commands to the states. First, as demonstrated, *infra* pp. 23-24, Congress *may* issue commands to the States when it is acting as an arbiter of interstate disputes. In any event, the 1985 Amendments are not commands, but merely set out State-created and congressionally-approved LLRW disposal "milestones" which the States are *encouraged* to attain through a series of incentive provisions. It is those incentive provisions that are subject to federalism scrutiny, *not* the milestone provisions, or, as New York would have it, the 1985 Amendments as a whole.

New York builds its entire "command" argument on the presence of the word "shall" in several provisions of

the 1985 Amendments. In so doing, New York ignores precedent, context, structure, legislative history, and the "plain statement" rule that applies to statutory interpretation of federal statutes challenged on federalism grounds. See *Ashcroft*, 111 S. Ct. at 2403-06.

This Court has never based its federalism decisions on the presence or absence of words like "shall" in a challenged federal statute. Had it done so, there would have been little need for the intense intellectual debate that characterized *FERC* v. *Mississippi*, which also involved a challenge to a federal statute in which "shall" provisions were directed at States as States. *FERC* v. *Mississippi*, 456 U.S. at 759, 761. No opinion in that case, however, turned on that fact: the majority opinion rested on the options left to States disinclined to follow the congressional scheme, and the dissenting opinion relied upon the *National League of Cities* balancing test.

In any event, it is clear that Congress intended the 1985 Amendments *not* as federal commands to the States, but principally as State-created incentives to meet the wholly State-created goals that formed the basis of the 1985 compromise among the States and regions. The first "shall" comes in the 1985 Amendments' statement of policy, which was borrowed from the original 1980 Act: "Each state shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of [LLRW] generated within the State." 42 U.S.C. § 2021c(a)(1). That statement is a mere truism that recognizes two key facts (1) the federal government's refusal to enter the field and "rescue" nonsited states from their own failure to act, and (2) the authority granted to the sited regions to prevent nonsited states from exporting their waste to unwilling neighbors. Moreover, it is simply absurd to cast Congress' expression of its decision to *grant the States' request* for continued State authority over LLRW disposal as a federal *command* to the States.

Nor are the milestone provisions federal commands. As demonstrated by their inclusion in the section titled

"Requirements For Access To Regional Disposal Facilities," the milestones are merely goals, the attainment of which allows a State to receive certain benefits, most importantly, access to neighboring states' disposal facilities. The milestones are thus the *price* for continued access—a price the nonsited States agreed to pay in the 1985 compromise. See, *e.g.*, 131 Cong. Rec. H11,417 (daily ed. Dec. 9, 1985) (statement of Rep. Campbell) ("The [1985 Amendments], in essence, embod[y] a carefully crafted agreement whereby the three existing site states allow the January 1, 1986 cut-off date to be extended 7 years to December 31, 1992. In return other states and waste generators agree to meet a series of milestones . . .").[17]

At most, New York might argue that the policy statement and milestone provisions *could* be interpreted as federal commands. But, as this Court made clear in *Ashcroft*, any ambiguity in a statute challenged on federalism grounds must be construed *against* a possibly constitutionally impermissible interpretation. *Ashcroft*, 111 S. Ct. at 2403-06. Thus, for New York's argument to prevail, "it must be plain to anyone reading the Act," *id.* at 2404, that Congress meant to compel State compliance with the milestone goals even with respect to States willing to forego the incentives and lose the benefits of compliance. That reading of the 1985 Amendments is not plausible, much less plain. The 1985 Amendments, in accordance with the State compromise upon which they are based, merely set State-created and congressionally-approved goals for the States, noncompliance with which invokes the various incentive provisions—namely, the Access, Expenditure, and Take Title Provisions. That *structure* is constitutionally unobjectionable. See *Massachusetts* v. *Mellon*, 262 U.S. 447, 482 (1923).

The constitutionality of the 1985 Amendments must be judged by what they do, not by what phraseology Con-

[17] Even if the milestones were interpreted as direct federal commands to the States, New York's challenge is moot, since New York has met each of the milestones and judicial invalidation would not enable it to "undo" its compliance.

gress chose to use. The proper inquiry is whether the particular *means* adopted by Congress to encourage States to comply with the States' own bargain are within Congress' enumerated powers and compatible with federalism values. Thus, in accordance with Justice Cardozo's cogent expression of the general rule in constitutional adjudication that the judicial "knife is laid to the branch instead of at the roots," *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 60 (N.Y. 1920), *cert. denied*, 256 U.S. 702 (1921), we address each of the incentive provisions in turn.

III. The Incentive Provisions Of The 1985 Amendments Designed To Hold States To Their LLRW Bargain Are Constitutionally Permissible.

At bottom, this case is primarily an attempt to bootstrap a challenge to the most controversial fragment of the 1985 Amendments—the Take Title Provision—into a vehicle for striking down the entire law, particularly the Access Provisions, which encourage New York to take responsibility for its LLRW disposal problems. Simply put, New York, having drained the 1985 Amendments of all benefits, asks this Court belatedly to declare unconstitutional what remains of the bargain, so that New York waste generators can continue to burden other States with the enormous quantities of waste generated in New York. Under no circumstances should New York's bootstrap approach prevail. First, the Access and Expenditure Provisions are plainly constitutional under settled law not challenged in this case. Second, the Take Title Provision is itself constitutional under any applicable federalism test. Finally, in any event, the Take Title Provision is plainly severable.

A. The Access and Expenditure Provisions are Constitutionally Permissible.

Not surprisingly, New York devotes scant attention to the primary incentive enacted by Congress to encourage States to attain the milestone goals for LLRW disposal self-sufficiency—the grant of authority to sited States and

compacts to deny access to waste generated in noncomplying States. This Court has long recognized that Congress may, in the exercise of its plenary commerce authority erect barriers to interstate commerce, and "Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980). When Congress does so, as it did in the 1985 Amendments, "any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 653 (1981).

Obviously, there is no basis for a federalism challenge to such a conditional grant of authority by Congress to the States. First, the regulation of interstate commerce is a power expressly granted to Congress and therefore clearly outside of the Tenth Amendment's reservation of rights to the States and the people. Second, as discussed, *supra*, offering the States this tool to solve their common problems results in neither aggrandizement of national power nor a loss of political accountability. On the contrary, the Access Provisions, which place the costs of a State's unwillingness to respond to its LLRW problems on its industry and ultimately its citizens, *ensure* that local and State officials are held politically accountable for local and State policies (or the lack thereof). Third, the Access Provision does not operate against the States as States. Rather, it *permits* a compact to exclude LLRW generated in a noncomplying State outside of its compact region, regardless of whether that waste was generated by the State itself or by a private generator.

The 1985 Amendments' provision for incentive payments to complying states is similarly unobjectionable. It is no more than a routine exercise of Congress' Spending Power. It is well settled that "[i]ncident to this power, Congress may attach conditions on the receipt of federal

funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the receipt with federal statutory and administrative directives.'" *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (citation omitted). Here Congress conditioned the receipt of surcharge rebates on attainment of the milestones. *States* choose whether or not to meet the conditions required to obtain such funds, and the Expenditures Provision is thus an archetype example of the "cooperative federalism" that this Court has consistently sanctioned.

B. The Take Title Provision is Constitutionally Permissible.

New York devotes the bulk of its attack to the Take Title Provision. That provision also withstands federalism scrutiny. The basic thrust of New York's argument is that the Take Title Provision is not an incentive or penalty, but an alternative means of performance that essentially leaves it with a Hobson's choice of compliance with one of two federal commands. Even if New York's characterization of the Take Title Provision as a "command" were true—and the Compacts maintain that it is not, see *supra* p. 8 n. 13, —the provision still would be constitutionally unobjectionable.

First, when the federal government acts as an umpire to help the States resolve a "commons" problem—*e.g.*, a dispute over water rights or pollution with respect to a river that flows through several States—or, as here, a "reverse commons" problem, see *supra* pp. 2-3, this Court has repeatedly recognized that the federal government is constitutionally empowered directly to *command* State performance where one State attempts unfairly to exploit the regional "commons." See, *e.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 185 (1982) (noting that the Court had in the past "impose[d] on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940); *New Jersey* v. *City of*

New York, 283 U.S. 473 (1931); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922). As this Court only recently stated, these federal common law cases reflect the appropriate level of "respect for the sovereignty of the States" in the context of resolving interstate disputes. *Arkansas* v. *Oklahoma*, Nos. 90-1262, 90-1266, 1992 WL 32008, at *4 (U.S. Feb. 26, 1992). Nonetheless, New York seeks to distinguish the precedents as involving judicial rather than legislative powers. Plainly, however, the Tenth Amendment does not impose greater limits on congressional action than on federally-created common law. *Cf. Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938); *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27 (1951) (recognizing that cooperative State and congressional resolution of interstate disputes through interstate compacting is preferable to federal common law resolution). In any event, this Court has expressly approved congressional commands to the States in the context of interstate "commons" problems. *See City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325-26 (1981) (upholding Clean Water Act provisions which commanded States whose water licensing decisions could impact other States to give those other States reasonable notice and an opportunity to be heard and also to issue written explanations of the licensing decisions).

Second, New York does not allege any of the potential threats to State sovereignty this Court has found objectional outside the interstate dispute context. For example, New York does not allege that compliance with the 1985 Amendments' milestones "will entail basic structural changes . . . in any . . . traditional local service." See *Friends of the Earth* v. *Carey*, 552 F.2d 25, 38 (2d Cir. 1977) (cited with approval, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 n.30 (1981)). The LLRW disposal siting process is ordinary land use regulation routinely practiced by New York's state and local governmental authorities: "The state regulatory machinery is not diverted from its regular duties but continues to enforce the identical type of rule it has traditionally implemented." *Nevada* v. *Skinner*, 884 F.2d 445, 453 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070

(1990); *FERC* v. *Mississippi*, 456 U.S. 742, 752-53 (1982); *Testa* v. *Katt*, 330 U.S. 386 (1947).[18]

Third, stripped of New York's rhetoric concerning the phrase "take title," the only real intrusion that New York alleges is the financial burden of solving its LLRW disposal problems. But, the mere necessity of appropriating funds, standing alone, is not the kind of injury found impermissible by this Court in *National League of Cities* or any other case where, as here, the basic policy choices are left to the States. See *Friends of the Earth*, 552 F.2d at 38; see also *supra* p. 14. Congress often takes actions that directly or indirectly impair state finances. In any event, no matter how economically burdensome the siting process may be, New York need not incur such costs, since, as explained, *supra* p. 14, New York is free under the 1985 Amendments to contract for access by its LLRW generators to the facility of another State or compact, with the entire cost of this discretionary access borne by the waste generators themselves. And, given New York's authority to tax generators of waste, the existence of the Expenditure Provisions, and New York's ability to revoke its "agreement state" status and allow the federal government to bear regulatory burdens, additional resources may not be necessary even if New York does elect to allow a disposal facility in New York.[19]

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[18] While the fact that "radioactive" materials are involved certainly complicates the land use equation, "New York State has been active in the regulation of such materials within its borders for close to three decades as an agreement state in accordance with 42 U.S.C. § 2021(b)." 91-543 Petition at 12 n.5.

[19] "The New York State legislature appropriated $5.87 million to fund Siting Commission activities in fiscal years 1990-1991. As of the end of the calendar year 1990, the State collected approximately $40.8 million in low-level radioactive waste assessments from the electric utilities to reimburse expenditures by the Siting Commission, Department of Environmental Conservation, and Department of Health. The State earned $3.1 million in interest on those funds." Department of Energy, *1990 Annual Report on Low-Level Radioactive Waste Management Progress* 34 (1991); *Cf.* Wash. Rev. Code § 43.200.080 (1990).

Fourth, even under the *National League of Cities* test, this Court consistently recognized that "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 n.29 (1981). This is such a case. Congress has a strong federal interest—well grounded in constitutional text and history—in enforcing the interstate and interregional agreements it allows to take place. The 1985 Act was front-end loaded in benefits to New York and other large LLRW generators. New York consumed its full share of those benefits without a hint of its view that the statutory scheme that allowed it to export its waste was unconstitutional. It does no offense to State sovereignty or to fundamental values of federalism for Congress to adopt a mechanism that now holds New York to its obligations under the State bargain. *Cf. FERC* v. *Mississippi*, 456 U.S. at 784 n.13 (O'Connor, J., dissenting in part) (Congress may place requirements on the States so that policies "which the States themselves had chosen [would] be maintained") (citation omitted).

Finally, and most clearly, New York's own conduct—exporting its waste for the full seven year extension period—constituted its acceptance of the Take Title Provision just as effectively as if that provision had been a part of the original State bargain.[20] Simply put, this Court has repeatedly held that under any federalism test, where a State accepts congressionally-created benefits (here seven additional years of access to cited state

[20] *Cf. West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 35 (1951) (Jackson, J., concurring) ("West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact. . . . Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act"); Restatement (Second) of Contracts §§ 19, 22 (1979).

LLRW disposal facilities and payments pursuant to the Expenditure Provisions), the State may not belatedly challenge the conditions Congress placed on those benefits. See *FERC* v. *Mississippi*, 456 U.S. at 764-65 (Congress may place conditions on continued state regulation); *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987); *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). Here that rationale is particularly applicable because the sited States and the State members of ratified compacts have a reliance interest in enforcing the 1985 compromise, including the Take Title Provision which New York tacitly accepted by its conduct and receipt of benefits. New York hungrily devoured its salad, appetizer, entree, and dessert, and it may not now avoid the check by complaining that the entire meal was unconstitutional.

IV. The Take Title Provision Is Severable From The Remainder Of The Act.

Even if the Take Title Provision was constitutionally flawed, it is severable from the remainder of the 1985 Amendments. "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & N.E. Ry.* v. *Gutierrez*, 215 U.S. 87, 96 (1909). As Justice Cardozo explained: "Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert." *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 62-63 (N.Y. 1920), *cert. denied*, 256 U.S. 702 (1921). Thus, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quotations omitted). The 1985 Amendments clearly retain their vitality and are "fully operative as a law" even without the Take Title Provision.

The circumstances surrounding the passage of the 1985 Amendments make clear that Congress would have enacted the statute even without the Take Title Provision. First,

an expeditious solution to interstate LLRW disputes was imperative—the three sited States were seriously threatening to close their sites, an event that would have triggered a nationwide crisis in energy and health care. Congress recognized the urgency of memorializing the hard-fought compromise among the States before any new disputes erupted. See, *e.g.*, 131 Cong. Rec. S18,121 (daily ed. Dec. 19, 1985) (statement of Sen. Moynihan) Second, the Take Title Provision received scant attention in the congressional debate; indeed, the House passed the bill *without* the Take Title Provision. Third, and most important, the Take Title Provision was a last minute addition to the 1985 Amendments, which did not in any way change the structure or purpose of the legislation, but merely constituted an *addition* to the existing battery of State-proposed incentives to discourage States from breaching their promises to solve their LLRW disposal problems either individually or by compact. Indeed, the 1980 Act *already* allowed compacts to deny access. It is unthinkable that Congress would have wanted the nonsited States to have *no* incentives to keep their bargain—including those incentives already in existence—if the new incentive provided by the Take Title Provision was later found to be constitutionally flawed. See 131 Cong. Rec. H13,077 (daily ed. Dec. 19, 1985) (statement of Rep. Mackey) ("Because the provision comes in only in 1996 or 1993, it is intended that the provision be severable from the rest of the act, should it be found unconstitutional").

The 1985 Amendments without the Take Title Provision would still "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). The basic goal of both Congress and the States was an expeditious resolution of interstate LLRW disposal disputes in accordance with the 1985 compromise between sited and nonsited States. As the means for achieving that end, Congress enacted a whole series of incentive provisions—most of them proposed by the States themselves. Should the Take Title Provision fall, the remaining incentive provisions would

clearly still usefully serve their purpose. Indeed, as New York's bootstrap attempt to strike down the Access Provision demonstrates, the threat of non-access alone should be sufficient to encourage responsible nonsited States to comply with the 1985 compromise.[21]

This Court's decision in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894) is directly on point. In that case, the challenged act vested a state railroad commission with the power of prescribing fares, freight rates and other regulations. The petitioner challenged a provision that established penalties for overcharges and argued that this defect rendered the entire statute unconstitutional. This Court found the penalty provision severable, reasoning:

> "[I]t is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties . . . were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment."

Id. at 396; see also *United States* v. *Jackson*, 390 U.S. 570, 586 (1968) (quoting *Reagan*).[22]

Not only would felling the 1985 Amendments tree because of a defect in the Take Title branch run counter to congressional intent, it would be wholly inequitable

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[21] Even if concern for its own economy and citizens affected by denial of access would not spur New York, "the New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities." 91-543 Petition at 12 n.5, so New York will have no choice but to confront its LLRW disposal problems.

[22] While New York attempts to make much of the fact that there is no severability clause in the 1985 Amendments, this Court has long recognized that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968); "Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

to the sited States who relied to their detriment on the validity of the 1985 compromise as well as to the States that have entered compacts and operated through those bodies—at substantial expense—during the past seven years. In return for the benefit of seven years additional access for its LLRW to the sited States' facilities, New York and other nonsited States promised to attain LLRW disposal self-sufficiency by 1993. Even if New York could complain that somehow its consent was not informed by the possibility that its breach would invoke the Take Title Provision—and it cannot—removing that provision would be a full remedy, and any further invalidation of the 1985 Amendments would be an entirely unmerited windfall.[23]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[23] For similar reasons, the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Title II of Pub. L. No. 99-240, 99 Stat. 1859, in which Congress consented to seven of the nine existing interstate LLRW compacts, is constitutional and, in any event, severable from Title I, the 1985 Amendments. More fundamentally, the plaintiffs below challenged *only* the 1985 Amendments; neither in the courts below nor in the petitions for certiorari did any party raise any issue dealing with compact authorization under Title II. Thus, there is no basis for this Court to address any such issue at this time. *See, e.g., Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983); Sup. Ct. R. 14.1(a) ("[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court").